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In the Supreme Court of the United States

OCTOBER TERM, 1951

UEBERSEE FINANZ-KORPORATION, A.G., *Petitioner*

v.

J. HOWARD MCGRATH, *Attorney General*, as Successor to the Alien Property Custodian

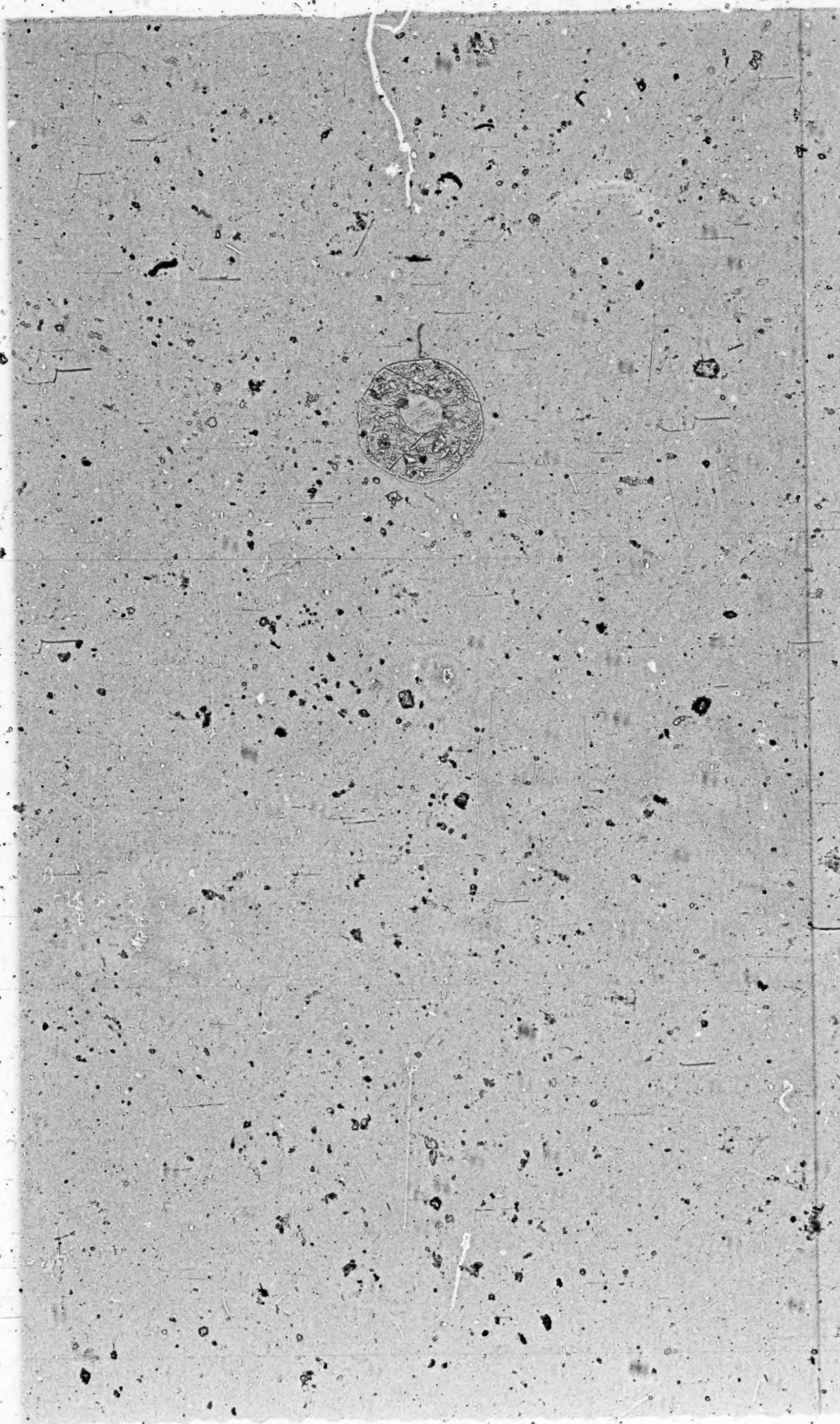
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 41) is reported at 82 F. Supp. 602. The opinion of the Court of Appeals (R. 2326), supplemented by a "Memorandum on Appellant's Motion for Clarification of the Opinion of the Court" (R. 2333), has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals (R. 2328) was entered on February 8, 1951. By order of May 8, 1951 (R. 2337), the time for filing the petition for a writ of certiorari was extended to July 8, 1951. The petition for a writ of certiorari was filed July 7, 1951. The judgment of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the holding of the courts below—that petitioner, a Swiss corporation, was substantially owned by enemies and therefore ineligible to recover vested property in an action under Section 9(a) of the Trading with the Enemy Act—was supported by the evidence.

2. Whether recovery of part of the vested property, proportionate to an asserted fractional non-enemy interest in petitioner, could be awarded to petitioner in this action.

STATUTE INVOLVED

The pertinent provisions of the Trading with the Enemy Act, as amended, are set forth in the Appendix to the Petition (pp. 18-20).

STATEMENT

This is an action brought under Section 9(a) of the Trading with the Enemy Act (40 Stat. 411, as amended, 50 U.S.C. App. §§ 1-39) by petitioner, a Swiss corporation, to recover certain property

vested by the Alien Property Custodian[1] pursuant to that Act. On a motion to dismiss the complaint, this Court held that the mere fact the petitioner was incorporated in Switzerland was not a ground for dismissal but that petitioner could recover only if it established that it was free of enemy taint. *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480. On remand, the District Court for the District of Columbia, after answer and extended trial, entered judgment for defendant on the merits. The court below affirmed, with one dissent (R. 2326-2328, 2333-2334).

The following facts were established by the evidence:—

1. At the outbreak of World War II, petitioner, a Swiss corporation, was the owner of record of majority share interests in several American corporations (Fdgs. 1, 2; R. 52). Their principal assets included a brewery, a chain of gasoline filling stations and oil producing and refining properties (R. 2, 7-8).

Petitioner had acquired the shares under somewhat unusual circumstances. Until 1929, Wilhelm

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[1] By Executive Order No. 9788, October 14, 1946, 11 F.R. 11981, the authority, rights, privileges and powers of the Alien Property Custodian were transferred to the Attorney General. The term "Custodian" will be used to indicate either official, as the context may require. The complaint was originally brought against James E. Markham, as Alien Property Custodian. Tom C. Clark, Attorney General, was later substituted, and J. Howard McGrath, the present respondent, was substituted on December 8, 1949 (R. 112).

von Opel and his brothers, citizens and residents of Germany, owned the Adam Opel works, a German concern manufacturing motor cars. Wilhelm dominated its management. (R. 1998-1999.) In 1929, General Motors Corporation acquired control of the concern but agreed with Wilhelm that he could retain 10% of the Opel stock (amounting to 600 shares—here called the Opel shares) (Fdg. 12, R. 53-54). He was also granted an option enabling him to sell the stock thus retained to General Motors at a predetermined price (R. 1803). Under the terms of the option (and of a reciprocal purchase option given General Motors) the Opel shares were placed in escrow with a New York bank (R. 1803).

In July 1931, Germany adopted regulations that required residents of Germany to secure licenses for transactions involving foreign exchange (R. 2313). Wilhelm and Marta, his wife, as such residents, were subject to the regulations. Fritz von Opel, their son, was not, because although a native-born citizen of Germany he had lived abroad since 1929 and thus had become a non-resident for purposes of the German foreign exchange laws. (Fdg. 16, R. 54.) On October 2, 1931, the scope of the new exchange rules was expanded (R. 2309) and farther expansion was in prospect (Fdg. 13, R. 54; R. 590). With this in mind (Fdg. 18, R. 54-5), Wilhelm, Marta, and Fritz, on October 5, 1931, signed a brief and informal instrument, (R. 1805,

Fdgs. 17, 18 (R. 54-55) that had been prepared with the utmost haste (R. 225-232, 239, 611). Its terms, applicable to both the Opel shares and the proceeds from their sale or exchange, were briefly these:

Fritz was given the 600 Opel shares that Wilhelm had retained under the arrangements with General Motors. Wilhelm and Marta, however, reserved the *usufruct* in the shares and their proceeds. The instrument provided as to this (R. 1806):

> The *usufruct* in the shares is not assigned to Fritz von Opel. It remains with Wilhelm and his wife * * * until the death of the survivor of them. However, 20% of all dividends and interest received will accrue to Fritz von Opel. [Italics added.]

Usufruct income not fully drawn by his parents was to be deemed an advancement to Fritz, for which he was accountable. Wilhelm insisted on the inclusion of the *usufruct* provisions and would not have signed the instrument without them (R. 160, 1987, 2000-2001). The instrument also provided that the gift was to revert to the parents if Fritz should die before them without leaving legitimate issue. Should they die before him the gift was to be treated as an advancement to Fritz which was to be taken from his share in his parents' estate (Fdg. 54, R. 61).

A "usufruct" in German law is an interest *in rem* that includes as a minimum the right to the income from the *res* (here subject to Fritz's claim to 20% of the income), a right to co-possession of the *res*, a voice in its management, a right to veto its transfer, and, in the view of some German commentators, certain voting rights where the *res*, as here, consists of shares of stock (Fdg. 52, R. 60-61).[2] The 1931 instrument did not, under German law, create an *in rem* interest because Fritz, the grantee, failed in terms to re-deliver possession of the *res* to his parents, but it did create their right to have the usufruct duly established (Fdgs. 32, 33, R. 57). It was in fact established prior to 1935 by delivery of the *res* to Dr. Frankenberg, a Swiss banker and Wilhelm von Opel's agent (Fdgs. 34-38, 42, 53, R. 57-58, 59, 61).

The written instrument did not fully reflect the understandings reached between Fritz and his parents (R. 240, 241, 2001, 2073). Thus, although the instrument indicated the contrary (R. 1806), it had been agreed that Fritz should convert the shares promptly into gold or dollars (R. 229, 234, 613-617, 2001). Accordingly, he sailed immediately for New York and there, on October 17, 1931,

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[2] In view of the intent of the parties, as disclosed by their contemporaneous and subsequent actions, that Wilhelm retain complete control over the subject of the gift and its proceeds, the trial court found it unnecessary to resolve the conflict among German commentators over the voting rights in shares held under usufruct. See *infra*, pp. 6-11, 17-21.

sold the 600 Opel shares to General Motors (Fdg. 19, R. 55). He did so not as donee but as his father's attorney-in-fact under a power given him after the gift (R. 1807). He deposited the proceeds, consisting of cash and General Motors shares, in a New York bank in Wilhelm's name; later, still acting as his father's attorney-in-fact, he transferred them to custodian accounts in his own name (R. 1861, 1863, 1862). He directed that 80% of the income be credited to a principal account and 20% to a special account of his own and that duplicate statements be sent to Wilhelm who also held a power of attorney to draw on the custodian accounts (R. 1865, 1869, 1870). Between 1931 and 1934, these funds were, with the approval of Wilhelm's agent Frankenberg, invested in properties that substantially correspond with those here in suit (*supra*, p. 3) (Fdgs. 2, 20, 21, 39, 40, 43, 46, R. 52, 55, 58, 59).

Another of the oral understandings was that Fritz would transfer the proceeds to a holding company so as to protect the several interests in the funds (R. 1987, 2001, 2008). This was also done early in 1932 when Fritz, after securing his father's approval, acquired with Dr. Frankenberg's help all the shares of petitioner and had the American assets transferred to it (Fdg. 20, R. 55, 2005-2006).

2. The purpose of these written and oral understandings among the Opels and their effect upon

the ownership and control of the funds in question were fully explained by petitioner itself in litigation with a federal instrumentality, in 1935 and 1936, which eventually reached this Court (R. 1968-2104).[3] Similar explanations were made orally and in writing to Swiss and American authorities.

In 1935, petitioner sued the Federal Reserve Bank of New York and others for the return of $1,250,000 of United States gold coins (R. 1970-1977). After petitioner had acquired the gold in 1933, the Secretary of the Treasury seized it under the Gold Acts (Acts of March 9, 1933, and June 30, 1934, 48 Stat. 1, 337). In its suit, as in its previous applications to the Treasury Department, petitioner asserted that under the 1931 instrument Wilhelm and Marta were the real and beneficial owners of this gold and that the Gold Acts did not apply to persons who, like Wilhelm and Marta, neither resided nor did business in the United States (R. 2081, 2084, 2085, 2067).

Petitioner filed, *inter alia*, supporting affidavits of Fritz (R. 1998-2018) and the German draftsman of the 1931 instrument (R. 1986-1990). Fritz declared that under the 1931 instrument he had acquired only "naked title" to petitioner's shares (R. 2090) and that he was left with a "mere legal

[3] *Uebersee Finanz-Korp.* v. *Rosen* (S.D.N.Y., 1935) affirmed, 83 F. 2d 225 (C.A. 2), certiorari denied, 298 U.S. 679.

title" and 20% of the income (R. 2001). He added that 97 of the 100 bearer shares (representing petitioner's entire capitalization) were deposited in a vault of a Swiss bank and that Dr. Frankenberg held the key as Wilhelm's agent and representative for the purpose of safeguarding his usufruct (R. 2017). Meier, petitioner's president, swore that Frankenberg conducted substantially all of its affairs (R. 1982-1983). He also told the United States Treasury Department in 1935 that members of the Opel family had a controlling interest in petitioner (R. 2234).[4] Petitioner also advised Swiss authorities that "a single group" controlled petitioner's capital stock (R. 2222).

3. The actual conduct of all participants in these arrangements conformed to the interpretation offered by petitioner to the federal courts and other authorities in 1935. From the outset, Wilhelm considered himself as being in control of the subject matter of the 1931 gift and was so considered by the others. It was he and not Fritz who had the final say about the sale to General Motors (R. 1967, 1968, 2227, 2229). When the German au-

[4] Significantly, petitioner's account book entitled "Foreign Management Accounts—Current Accounts" showed between 1932 and 1934 credits of $2,613,840.21 and from June to December 1933 credits of 2,500,000 Swiss francs, to "Consortium O" (Def. Ex. 49, R. 2220). "Consortium" means a group or syndicate (R. 845). It is apparent that "O" in "Consortium O" stood for Opel and that these entries showed the interest of the Opel family on petitioner's books.

thorities later fined him 3,500,000 Reichmarks (R. 448) because of the 1931 instrument, he observed that it was well worth that sum to have his assets "outside of the German locked safe" (R. 569). To help raise the funds that Wilhelm needed to pay this fine, petitioner had an oil lease sold by one of its American subsidiaries for about $150,000 (R. 1229, 1230). When Wilhelm became dissatisfied with Mr. Hoffacker, one of petitioner's principal agents in the United States (R. 1236), Frankenberg dismissed him (R. 1243-1244). Fritz advised officers of petitioner's American subsidiaries that he was accountable to his father (R. 1236) and that they worked for the latter (R. 1143). In 1939, Fritz informed Mr. Houghland, the president of one of the subsidiaries, that the "investors" in petitioner had decided to sell the stock of the subsidiary, a decision which Fritz deeply regretted (R. 2301). He amplified (R. 1143-1144) this cable by explaining to Mr. Houghland that his father, against Fritz' wishes, had ordered Frankenberg to sell the stock. Wilhelm apparently reversed this decision since the stock was not sold. Later, in January 1941, when the positions were reversed and Houghland suggested that, in view of the approaching war, Wilhelm might now be willing to sell the stock in the subsidiary, Fritz replied that his father would not be receptive to the idea (R. 1148).

For the most part, Wilhelm, in his management of petitioner's affairs, acted through Frankenberg,

who represented him, and who had at Wilhelm's request become petitioner's managing director (Fdg. 39, R. 58). Throughout the years and until the vesting, Frankenberg, as Wilhelm's agent, among other things, directed petitioner's major policies (Fdgs. 43, 45; R. 59). It was he who gave binding instructions regarding its investments and activities (Fdg. 43, R. 59). He also passed on important questions dealing with its subsidiaries. When he had to fill the positions formerly held by Mr. Hoffacker (see *supra* p. 10), he selected Mr. Ulrich, an old friend of his (R. 1243-1244; 1246). In all these matters his word was final. While Fritz participated from time to time in petitioner's affairs, he did so under the guidance of Wilhelm or Frankenberg (Fig. 45, R. 59); he never was an officer of petitioner; his authority depended on powers of attorney that Frankenberg issued to him (R. 1985, 2009-2010). In keeping with this status Fritz reported to Frankenberg and obtained his approval before important action was taken (R. 2014, 1242, 1137). Fritz on a number of occasions disagreed with decisions made by Frankenberg or Wilhelm but let it be known that there was nothing he could do about them (R. 1139, 1144). As the District Court pointed out, Frankenberg was the "guiding genius" (R. 1725). This guidance, however, was strictly vicarious; it was exercised on behalf of and for the benefit of Wilhelm, and so the trial judge found on the basis of "overwhelming evidence" (R. 1729, see also Fdg. 40, R. 58).

4. As has been indicated, Wilhelm and Marta von Opel were, at all relevant times, German citizens and residents. Wilhelm was a prominent and honored member of the Nazi party and various other Nazi organizations (R. 165-166). His son Fritz was, at least until November 21, 1939, a German citizen. He resided in Germany until December, 1929. Between then and 1939, he spent about 10% of his time in Germany (Fdg. 6, R. 52). He was in the United States from May 1940 until the trial.[5]

After the outbreak of World War II in Europe, Fritz applied for Liechtenstein citizenship (R. 1849-1852) and in a matter of weeks was naturalized by that country on November 21, 1939 (Fdg. 7, R. 52). In connection with his acquisition of this citizenship he paid sums totalling $10,000 to the national government and one of its communities, an amount equal to 3% of the country's annual budget (Fdg. 8, R. 53, 494). The Liechtenstein naturalization statute requires three years' residence, although this requirement may be waived "under extraordinary circumstances that ask for special consideration" (R. 1951). Fritz never resided nor was ever physically in Liechtenstein except while in transit to some other destination (Fdg. 7, R. 52-53). The statute also requires an oath of allegiance, which may be taken after citi-

[5] Between February 1942 and May 1945, he was interned by the United States Government as a potentially dangerous alien enemy (R. 394, 597).

zenship has been granted and may also be waived "under extraordinary circumstances". (Fdg. 9, R. 53, 1951). Fritz never took that oath, assertedly because he was too sick to travel, although the record shows that on the day of his naturalization he was in Budapest for the purpose of expediting production of bauxite for sale to a German aluminum producer (R. 893, see also R. 894, 1641, 2286). Significantly, Fritz advised an officer of one of petitioner's subsidiaries that he felt "obliged" to acquire a new citizenship for business reasons (R. 2294), and described his Liechtenstein passport as something he had bought for $10,000 and by which he was able to "fool the English" (R. 1146). He continued to regard himself as German and cheered the initial successes of the German armies (R. 1142, 1148, 1149, 1105, 1106). As the court below put it, he had a "continued interest in the welfare of and sympathy for Germany" (Fdg. 10, R. 53).

ARGUMENT

The sole question presented on this record is whether petitioner is eligible to recover any of the property in suit. That question turns on whether the petitioner is an enemy or is enemy-tainted within the principles stated by this Court upon its consideration of the motion to dismiss the complaint. 332 U.S. 480. After careful review of voluminous evidence, the District Court concluded that "it would be difficult * * * to find a stronger case of enemy taint" (R. 50); the majority of the Court of Appeals likewise emphasized that "this is not a

borderline case" (R. 2334). We think those courts correctly applied the legal principles laid down by this Court to the facts found by the District Court, and that the petition presents no issue calling for further review.

I.

A. Section 2 of the original Trading with the Enemy Act defined a corporation as an enemy if it was incorporated or did business in an enemy country. In 1925, this Court construed the statutory definition as exclusive and explicitly rejected the doctrine established in England by *Daimler Co.* v. *Continental Tyre & Rubber Co.*, [1916] 2 A. C. 307, that a corporation, although incorporated in non-enemy territory, was an enemy if it was owned or controlled by enemies.[6] *Behn*,

[6] The *Daimler* case established that "the character of those *who can make and unmake* * * * [the corporate] officers, *dictate their conduct* mediately or immediately * * * and call them to account" may be material in determining the corporation's enemy character. A corporation was to be deemed an enemy if its "agents or the persons in *de facto* control of its affairs, whether authorized or not, are resident in an enemy country, or, wherever resident, are adhering to the enemy or *taking instructions from or acting under the control of enemies*". [1916] 2 A. C. at 340, 345 (italics added). See also *The St. Tudno*, [1916] P. 291; *The Polzeath*, [1916] P. 241; *The Michigan*, [1916] V Ll. P. C. 421; *The Hamborn*, [1919] A.C. 993; *In re Badische Company*, [1921] 2 Ch. D. 331.

Like principles were applied in early American decisions in the field of prize law (to which the Trading with the Enemy Act is historically and constitutionally related). *Stoehr* v.

Meyer & Co. v. *Miller*, 266 U. S. 457; *cf. Hamburg-American Co.* v. *United States*, 277 U. S. 138. Under this strict territorial construction, the World War I Custodian lacked power to seize enemy property whenever an enemy had placed his American assets into a neutral corporation in exchange for all of its shares.

In order to cope with the new patterns of corporate control and economic warfare that had emerged since World War I, Congress, at the outbreak of World War II, amended Section 5(b) of the Act so as to authorize the vesting of "any property or interest of any foreign country or national thereof." First War Powers Act, 55 Stat. 838, 50 U.S.C. App. § 5(b). This Court recognized, on its consideration of the motion to dismiss the complaint, that this amendment required the reformulation of the concept of "enemy". It therefore held that Section 2 must now be regarded as "merely illustrative, not exclusionary" (332 U. S. at 488-489), and that persons or corporations affected with an "enemy taint" are now within the reach of the term "enemy". It also abandoned (at 486), as "destructive of the objectives of the 1941 amendment to § 5(b)", the doctrine of *Behn, Meyer & Co.* v. *Miller, supra*. It pointed

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Wallace, 269 Fed. 827, 840 (S. D. N. Y.), affirmed, 255 U.S. 239. See *e.g. The William Bagaley*, 5 Wall. 377, 409; *The San Jose Indiano*, Fed. Case No. 12322 (C. C. D. Mass.); *The Friendschaft*, 4 Wheat. 105, 107; *The Cheshire*, 3 Wall. 231, 233.

out that one of the evils at which the 1941 amendments were aimed was that enemies "had through numerous devices, including the corporation, acquired *indirect control or ownership* in industries in this country for the purposes of economic warfare" (pp. 484-485). It refused to assume that Congress intended the seizure and retention of property of "friendly or neutral foreign interests whose investments in our economy were *in no way infected with enemy ownership or control*" (p. 487). But it unequivocally rejected the view, adopted in the *Behn, Meyer* case, *supra*, that a plaintiff which "was *owned or controlled* by enemy interests" could recover vested property (p. 486). (Italics added throughout.) In the light of this opinion and the findings made by the trial court, we think it clear that petitioner is an enemy within the reach of Section 2 of the present Act.

B. It is not disputed that the Opel parents were enemies within the literal terms of that section. Nor is it disputed that they had a usufruct—an *in rem* property interest under German law—in all of the shares of petitioner, a Swiss holding company. As to the scope and effect of the rights thus held by the enemy parents, petitioner has taken two diametrically opposite positions. In 1935, in its "Gold" case (*supra*, pp. 7-9), it contended that Fritz von Opel had only bare legal title and that his parents had the entire beneficial interest. Now it asserts that the beneficial inter-

.est was in Fritz and seeks to dismiss the interest of the parents as "remote" and "unimportant". Thus, the question presented to the courts below and to this Court is fundamentally not one of the interpretation of this Court's prior opinion, but one of fact as to which of these two conflicting views of the rights and powers possessed by the parties to the underlying agreements is correct.[7]

C. The courts below were clearly warranted in accepting the view of the facts which petitioner had urged in 1935. There was ample evidence before them that all parties, at all relevant times, regarded the Opel parents as the owners of petitioner, and, through it, of the properties in suit. Thus, Wilhelm stated in 1934 that the effect of the 1931 agreement was to place "his [Wilhelm's] assets outside of the German locked safe" (R. 569). Fritz in 1937 told Crittenden (president of one of the American subsidiaries) that "he was entrusted with the use of a considerable amount of money by his father under what he described as a usufruct contract and, in a general way, he had the handling of the funds and accounted back to his father" (R. 1236). Fritz in 1939 invited Houghland, the president of another subsidiary, to meet

[7] In the District Court counsel for petitioner candidly admitted that it would lose this case if its assertions in the "Gold" case that the Opel parents owned the beneficial interests were true (Tr. 2677-86; Tr. will be used herein to refer to the unprinted transcript of the trial, a copy of which petitioner has filed with this Court).

Wilhelm because "after all, you work for my father" (R. 1143). Fritz in January, 1941, declined because his father would not be receptive to the idea, to consider Houghland's suggestion that petitioner sell the shares of that subsidiary (R. 1148).

Examination of the nature of the rights conferred by a usufruct, and of the conduct of the parties with respect to the petitioner and the properties here in suit, confirms this view. In the first place, it is undisputed that by virtue of the usufruct the Opel parents had the right to receive the income derived from the American enterprises (subject to Fritz's contractual right to 20% of that income). We agree with the court below that this, without more, was sufficient to preclude recovery. As that court said (R. 2327):

> This case does not involve a diluted "taint"; it involves the ownership by enemy nationals of the economic benefits of American business. This seems to us to be a more obvious objective of the vesting provisions of the statute than is the bare ownership of a sterile legal title. As between the right to the naked tree and the right to the periodical fruit, the benefit to the enemy would be more in the latter than in the former.

In addition, the Opel parents had the important rights to co-possession of the shares and to prevent any transfer of them. Finally, whatever uncer-

tainties there may have been in the German law as to the location of voting rights under the usufruct, there can be no doubt that the understanding of the parties and their consistent practice was that entire control of the enterprise remained with Wilhelm. Wilhelm's agent Frankenberg, as managing director of petitioner, was the "guiding genius" to whom all matters of importance were referred, who hired and fired officers of the American subsidiaries and determined their policies, and who had the unquestioned power to override Fritz's wishes.[8]

D. Petitioner attacks the lower court's conclusion—and, by the same token, its own pre-war position—by asserting (Pet. p. 5; see also p. 12) that "the record is clear that Wilhelm and Marta von Opel never exercised any of the rights which they had on account of the usufruct". This assertion ignores the realities of the situation.

Petitioner emphasizes, for instance, that "Wilhelm and Marta * * * did not request or receive any of the dividends" (Pet. p. 5). But this fact is

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[8] The fact that petitioner, through a wholly-owned subsidiary, did business in Hungary after the outbreak of war was properly regarded by the District Court as "an additional circumstance which of itself perhaps would not prevent recovery by plaintiff * * * but which with the other facts of the case tends to indicate enemy taint" (R. 49). The facts as to this aspect of the case are set out in the District Court's opinion (R. 49-50), and findings (Fdgs. 22-31, R. 55-57).

wholly irrelevant when seen in its context. For though it is true that it does not appear that the petitioner ever paid dividends to anyone, it is also true that there was every reason why Wilhelm would not want it to. Under the German exchange regulations, Wilhelm and Marta would have been compelled to convert any dividends received into reichmarks. Like most Germans similarly situated, they knew the truth of the saying then current in Germany that "money alone shouldn't make you happy; you should have it in Switzerland to be happy about it" (R. 228) and they acted accordingly (*ibid.*). Voluntarily to return assets of the petitioner into "the locked German safe" (R. 569) would have run counter to all that the Opel family and Frankenberg had accomplished since 1931. Indeed, Wilhelm did make use of petitioner's resources whenever he was in need of foreign exchange. Thus, $150,000.00 was raised by one of petitioner's American subordinates to help pay Wilhelm's fine to the German government (R. 1229-1230) and petitioner provided Wilhelm with funds for a trip to South America (R. 131).

The assertion that the usufruct was not exercised disregards the facts in other respects. The Opel parents exercised not merely the right to co-possession which the German Civil Code granted them explicitly; they had, in fact, exclusive possession, through Frankenberg who had been in-

stalled as petitioner's managing director at Wilhelm's request and as his representative. And, finally, it was Frankenberg who completely controlled, on his master's behalf, petitioner's policies and operations and the policies and operations of its American subsidiaries until the date of vesting.[9] Significantly, petitioner omits all reference to this aspect of the case.

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[9] Nor can petitioner argue that Frankenberg's agency and with it Wilhelm's control ceased upon the outbreak of war because Frankenberg could not thereafter lawfully act as Wilhelm's agent. The following grounds fully justify the rejection of this argument by the trial court (See Fdgs. 41, 43, R. 59):

(1) Agencies are not necessarily terminated by war and, in particular, the agent's authority to preserve his principal's property continues. *Sutherland* v. *Mayer*, 271 U.S. 272, 288, *Williams* v. *Paine*, 169 U.S. 55; see also *Fujino* v. *Clark*, 71 F. Supp. 1 (D. Haw.), affirmed, 172 F. 2d 384 (C.A. 9), certiorari denied, 337 U.S. 937; *Second Russian Insurance Co.* v. *Miller*, 297 Fed. 404 (C.A. 2), affirmed, 268 U.S. 552; *Pipe* v. *The La Salle*, 49 F. Supp. 662 (S.D.N.Y.); and *Daimler Co.* v. *Continental Tyre & Rubber Company*, *supra*, [1916] 2 A.C. 307, 326, 349.

(2) It is sufficient if this agency and control existed at the outbreak of the war. *Schrijver* v. *Sutherland*, 57 App. D. C. 214, 19 F. 2d 688, certiorari denied, 275 U.S. 546; *Société Suisse* v. *Cummings*, 69 App. D.C. 154, 99 F. 2d 387; *Sarthou* v. *Clark*, 78 F. Supp. 139 (S.D. Cal.); *Beck* v. *Clark*, 86 F. Supp. 565 (D. Conn.).

(3) Termination of Frankenberg's agency would in any event not establish that Wilhelm's control terminated. Wilhelm may have acted in person or through other agents. Indeed, the court found (Fdg. 45, R. 59) that, throughout, Fritz acted under his father's direction. The record is bare of any suggestion that, up to the date of vesting, the relationships between Fritz and Wilhelm, or between petitioner and Wilhelm, underwent any change whatever.

E. It is thus clear not only that the usufruct rights were exercised, but that the rights granted a usufruct holder under German law were considered by the parties as the very minimum to which the Opel parents were entitled. Petitioner cannot dispute that had Wilhelm and Marta von Opel owned all of the Uebersee shares outright, its American assets could properly have been vested and retained. Petitioner now in effect argues that they could escape seizure and retention of these assets by placing the same shares under a usufruct arrangement which left in them all the powers of control and substantially all the rights of beneficial ownership which they could have had as outright owners. This argument is in startling contrast to the admission by petitioner's counsel in the District Court that it would lose its case if its assertions in the "Gold" case concerning the beneficial ownership of petitioner were true.[10] In any event, such an argument would receive short shrift in other fields of the law.[11] To allow it to prevail under the Trading with the Enemy Act would sanction easy evasion of that Act. It would reduce the 1941 amendment and the prior decision of this Court in this case to a mere requirement of one additional link in the chain through which enemy ownership and control are exercised.

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[10] Tr. 2677-8. See fn. 7, *supra*, p. 17.

[11] See *e.g.*, *Hormel* v. *Helvering*, 312 U.S. 552, *Helvering* v. *Clifford*, 309 U.S. 331; *Commissioner* v. *Lamont*, 127 F. 2d 875 (C.A. 2).

F. Petitioner also suggests (Pet. p. 12) that the vested properties in suit were not useful for economic warfare. It appears to argue that under this Court's prior decision the Custodian has no authority to retain vested property, unless it can be used for that purpose. We can read no such requirement in the Court's opinion. Moreover, petitioner's suggestion misconceives the very purposes of the Trading with the Enemy Act. In the first place, most property is convertible into cash and may serve as basis for the extension of credit. For this reason, the Custodian has vested thousands of bank accounts, negotiable instruments, estates and other interests in real and personal property, both tangible and intangible. See *Annual Report, Office of Alien Property* (1949, pp. 46, 59, 67, 69). These assets have been vested because their aggregate value is substantial, and if not vested they might have enabled our enemies to mobilize considerable financial resources in this country. By that vesting our enemies were denied "the opportunity to secure advantages to themselves or to perpetrate wrongs against the United States * * * through the use of assets that happened to be in this country." *Propper* v. *Clark*, 337 U. S. 472, 481. Secondly, "the purpose of the Act was to reduce to possession all accessible enemy property, not only to cripple Germany, *but to prosecute the war*" (italics added). *Lizrodt* v. *Miller*, 17 F. 2d 533 (C. A. 2). Finally, enemy property

of every character was vested so as to make it available to satisfy the claims of American citizens.[12]

II.

Although petitioner claims the vested property in its own right and in its own name, it argues (Pet. pp. 13-16) that the courts below erroneously failed to return the "fractional" non-enemy interest represented by Fritz. We think that this claim was properly rejected for a number of reasons. We need not consider the question whether such a partial recovery could be awarded in any case, or the further question whether, on the facts of this case, Fritz von Opel had any present interest on which such a recovery could be predicated.[13]

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[12] Section 34 of the Act provides a comprehensive scheme for the payment of American creditors of the former enemy owners of vested property; Section 39, enacted as part of the War Claims Act of 1948 (62 Stat. 1246), prohibits return of vested assets to nationals of Germany and Japan. The War Claims Act earmarks these assets for the compensation of Americans who suffered at the hands of our enemies.

[13] As the court below rightly held, Fritz's claim to 20% of the dividends was a purely contractual right not rising to the dignity of a property interest in the shares (R. 2334). His bare legal title to the shares is clearly not an interest entitled to recognition under the Trading with the Enemy Act. *Stoehr v. Wallace*, 269 Fed. 827, 835 (S.D.N.Y), affirmed, 255 U.S. 239. Nor does the third interest claimed by Fritz—a remainder interest in petitioner's shares which will vest in possession if Fritz or his legitimate issue should survive both his parents—support a partial recovery. This is because the

For in any event (a) this claim was advanced too late, (b) petitioner is in no position to assert it on its stockholder's behalf, and, finally, (c) the asserted separate non-enemy interest is neither separate nor non-enemy.

A. Neither in its pleadings nor during pre-trial proceedings did petitioner indicate that it might seek recovery of Fritz's "fractional" interest. Moreover, as petitioner's counsel frankly stated (Tr. 2711), they declined throughout the trial to argue that question. Not until the close of the argument on the twenty-fourth day of the trial did petitioner's counsel indicate that a question of partial recovery was involved.[14] At that stage, however, petitioner's failure to present evidence concerning the feasibility and method of separating the respective interests and their value had left the trial judge without guidance for framing a decree in its favor. Although the court indicated its surprise over petitioner's claim to a partial recovery and repeatedly called counsel's attention to the inadequate record made in its support (Tr. 2951, 2953, 2954, 2959, 2960, 2961), peti-

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enemy character of a corporation and the extent and nature of the asserted non-enemy interests cannot be changed after the date of vesting. *Swiss National Insurance Co.* v. *Miller*, 267 U.S. 42.

[14] Similarly, petitioner did not advert to this contention in the Court of Appeals until it filed its reply brief.

tioner did not move to correct this deficiency. In these circumstances we think the trial judge acted entirely within the scope of the discretion entrusted to him in the conduct of a lengthy and complicated trial when he refused to adjudicate a claim so unseasonably and inadequately presented.

B. But even if the claim had been seasonably presented the courts below could not have sustained it in the procedural posture of this case. The sole plaintiff in this action is petitioner, a Swiss corporation, which seeks recovery of its vested assets. To succeed, petitioner must establish, under this Court's decision, that it is not an enemy, that it is free from enemy taint. Since it has failed to establish that it is eligible to recover its property under Section 9(a) of the Act, judgment was properly entered for the respondent. Plainly, no recovery can be awarded to Fritz in this action, for he is not a party plaintiff.[15] Nor do we perceive any theory on which petitioner could sue on his behalf. We know of no basis on which a corporation can sue for the benefit of its individual stockholders. See the Government Respondents' Brief in Opposition, *Kaufman* v. *Société Internationale Pour Participations Indus-*

[15] Fritz is the plaintiff in three suits now pending in the Southern District of New York and the District of Columbia. *Fritz von Opel* v. *McGrath*, Civ. 50-70; *Fritz von Opel* v. *Clark*, Civ. Action No. 1910-49; *Fritz von Opel* v. *Clark*, Civ. Action No. 1923-49.

trielles et Commerciales, S.A., No. 172, this Term, pp. 12-14. And to allow an enemy tainted corporation to secure even a partial recovery would plainly defeat the purposes of the act, for then the property recovered would enure, in part, to the benefit of the enemy interests in the corporation.

C. Finally, the "fractional" interest of Fritz is separate and non-enemy in the most superficial sense only. As the trial court put it, "the neutral aspect of ownership in the property is insignificant" (R. 50). This is not a case of enemies and non-enemies dealing at arms length with each other. Fritz was subject in a very substantial degree to the influence and control of his father. In numerous fields of the law, transactions between members of a family are treated differently from those between strangers. In tax cases, for example, ownership by a family is often regarded as equivalent to ownership by the head of the family, *e.g.*, *Helvering* v. *Horst*, 311 U. S. 112, 118; *Harrison* v. *Schaffner*, 312 U. S. 579, and arrangements between the members of the family are subject to special scrutiny. *Helvering* v. *Clifford*, 309 U. S. 331, 335; *Commissioner* v. *Tower*, 327 U. S. 280, 291. Like principles have been applied under the Trading with the Enemy Act. *Fujino* v. *Clark*, 71 F. Supp. 1 (D. Haw.), affirmed, 172 F. 2d 384 (C. A. 9), certiorari denied, 337 U. S. 937. Similarly, in considering the neutral aspects of Fritz's alleged separate interest the family relationship

between Fritz, the "non-enemy", and Wilhelm, the enemy, is most significant. This relationship imposed upon petitioner the burden of establishing convincingly that Fritz was not subject to enemy influence and control. Such a showing has not been made. On the contrary, the evidence clearly establishes that Fritz participated in the management of petitioner as his father's tool and agent. As the District Court found, his activities for petitioner were largely carried on "with the guidance and direction of Wilhelm von Opel, or his agent, Hans Frankenberg". (Fdg. 45, R. 39) Obviously, therefore, Fritz was anything but an innocent bystander. Moreover, the extraordinary circumstances under which, after the outbreak of World War II, he purchased a Liechtenstein passport, and the sentiments he expressed on the early successes of the German armies clearly indicate that his allegiance to a neutral country was one in name only. In the light of the foregoing facts, it seems fanciful to argue that this Court, in referring to "friendly or neutral foreign interests whose investments in our economy were in no way infected with enemy ownership or control" (332 U. S. at 487), was visualizing an interest of the sort here asserted.

CONCLUSION

Petitioner asserts two issues. The issue whether petitioner is an enemy turns, not on questions of law, but on the inferences to be drawn from a par-

ticular, and relatively unique, factual situation. The claim to a partial recovery was not seasonably made below, cannot be asserted by this plaintiff, and rests on erroneous assumptions of fact. Thus, neither of the issues sought to be raised by petitioner presents any question of general interest calling for further review by this Court. On neither is there any conflict with decisions of this or any other court. Accordingly, the petition should be denied.

Respectfully submitted,

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